SUPREME COURT, U. S.
FILED

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-852

BARRY JABLON,
Petitioner,

VS.

TRUSTEES OF THE CALIFORNIA STATE COLLEGES, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

SHELDON L. GREENE,
JOHN P. KELLEY,
LORENZ, GREENE AND KELLEY,
345 Franklin Street,
San Francisco, California 94102,
Counsel for Petitioner.

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The Petitioner, Barry Jablon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on August 9, 1973, and the denial of a petition for rehearing entered on September 5, 1973.

OPINION BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ..... and is attached hereto as Appendix A.

The unreported District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 9, 1973. A timely petition for rehearing filed on August 23, 1973 was denied on September 5, 1973. Original jurisdiction in the District Court was based upon 28 U.S.C. §1331(a). Supreme Court jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Ninth Circuit Court of Appeals, which reverses the District Court decision, materially conflicts with *Board of Regents v. Roth*, 408 U.S. 564 (1972), thus depriving petitioner of fourteenth amendment rights delineated by the Supreme Court.

2. Whether the Court of Appeals decision, in reversing the District Court decision, disregards uncontroverted facts and is irreconcilably inconsistent with itself.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was a nontenured English professor employed at San Francisco State College. At the conclusion of each year of teaching a decision is made as to whether a professor should be retained for the following year. Recommendations are sought from several committees within the College to guide the President of the College in determining whether a professor should be retained or terminated. Consistent with this procedure, the English Department Hiring, Retention and Tenure Committee (HRT), the Department Chairman, and the Dean of the School of Humanities all recommended that petitioner be retained as an Assistant Professor of English. (D.C. Opin. p. 2; Appendix B, p. xi.) Despite these recommendations the President of the College decided to terminate petitioner effective the following year. The campus President's letter of termination recited only that there was "substantial evidence" which raised questions of petitioner's "professional responsibility and fitness." Ibid.

An investigation was then conducted on the advisability of termination, which investigation resulted in the recommendation of the HRT Committee, the Chairman of the English Department, and the Dean of the School of Humanities that the President rescind the letter of termination and substitute a letter of retention. The President again disregarded these recommendations and terminated petitioner. Petitioner then instituted grievance procedures challenging the President's decision not to retain him. A

grievance hearing was held before a five member committee. The decision of this committee was in substantial disagreement with the President's decision to terminate petitioner. At no time did the President present the "substantial evidence" referred to in his termination letter. (App. B, pp. xi-xiii.)

While this issue was not raised at the administrative level, petitioner was an active member of the AFL-CIO affiliated American Federation of Teachers, and had actively participated in a faculty strike opposed by the campus President and the College administration. (App. Ct. Opin., App. A, p. iv, f.n. 1.)

Following his termination, petitioner filed suit in the United States District Court for the Northern District of California seeking reinstatement. The District Court, after a two and a half day trial, found in favor of petitioner. The District Court determined, *inter alia,* on the basis of uncontroverted testimony, that the President's failure to specify the grounds for termination, while at the same time referring to "substantial evidence" of petitioner's unfitness to teach, substantially damaged petitioner's reputation and restricted his future employment opportunities in violation of the fourteenth amendment.

The District Court based its decision on *Board of Regents v. Roth,* 408 U.S. 564 (1972) (hereinafter referred to as *"Roth").* The uncontroverted factual basis for the District Court decision was the testimony of three college professors who attested to the damage done to petitioner's future employment prospects. (R.T. p. 330)

The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals interpreted *Roth* to apply only if a person's honesty or integrity were challenged. (App. A, p. vii.)

Petitioner made a motion for reconsideration, asserting that the Court of Appeals had ignored uncontroverted evidence on petitioner's future employment prospects, and that the substantive ground of decision was in material conflict with the decision of the Supreme Court in *Roth*. The Court of Appeals refused to reconsider. (App. C.)

Petitioner contends that the decision of the Court of Appeals disregards uncontroverted facts, conflicts with *Roth*, and that there are internal contradictions in the opinion itself.

REASONS FOR GRANTING THE WRIT

1. DISREGARD OF UNCONTROVERTED FACTS

The Supreme Court in *Roth* stated the rule applicable to public employment termination as follows:

> Where a person's *good name, reputation, honor,* or *integrity* is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . (Emphasis added.)
>
> 408 U.S. at p. 573.

In the instant case, there are uncontroverted facts which show that petitioner falls within the ambit of *Roth*. The President terminated petitioner alluding

to, but never producing, "substantial evidence" of petitioner's unfitness to teach. The failure to explain is amplified by the fact that the termination disregarded the recommendations of all faculty committees that petitioner be retained.[1]

After hearing the testimony of three college professors on the issue of petitioner's future employment prospects, the District Court found consistent with the *Roth* test that:

> Unless Dr. Jablon is given written reasons for President Hayakawa's decision and a hearing to refute the charges made by the President, Dr. Jablon's standing and associations in his community can be seriously damaged. (R.T. p. 104; D.C. Opin. p. 9; Appendix B, p. xviii.)

The Court of Appeals disagreed with this application of *Roth,* and interpreted *Roth* as follows:

> A hearing is only required when a charge is made that 'might seriously damage his standing and association in the community. . . . Had it [the State] done so, this would be a different case.' (Ct. App. Opin. p. 5; Appendix A, p. vii.)[2]

While acknowledging that the test which should be applied to determine if petitioner has a right to a

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[1]The HRT Committee, the Department Chairman, and the Dean of the School of Humanities all recommended twice that petitioner be retained. (App. B, p. xi.)

[2]Petitioner in the instant case is in a much different position than the petitioner in *Roth*. Roth was employed for only one year at the University of Wisconsin before he was given notice, consistent with University procedures, that he would not be retained for an additional year. Jablon was employed by the College for three years before he received notice that his fourth year would be his terminal

hearing is whether his standing and associations in the community might be damaged, the Court of Appeals makes a factual finding that damage was not likely to occur. The Court of Appeals reached this conclusion despite its contradictory acknowledgment that the action taken *"may have a deleterious effect in Jablon's future employment prospects."* (Emphasis added.) (Ct. App. Opin. p. 5; Appendix A, p. vii.)

The uncontroverted evidence adduced at the District Court trial was precisely that the charge made by the State was likely to seriously damage petitioner's "standing and associations in the community." (R.T. pp. 314-316, 328, 359-360.) The District Court, after hearing the evidence on this issue, specifically found this to be the case. (App. B, pp. xviii, xix.)

The Court of Appeals, therefore, arrives at its reversal only by disregarding material, uncontroverted facts.

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2. CONFLICT WITH ROTH HOLDING AND REASONING

The conclusion of the Court of Appeals, to make any sense, must be based upon a restrictive interpretation of *Roth* that only damage to a person's honesty or integrity is protected by the fourteenth amendment. Did the Supreme Court, in using the language "good name, reputation, honor, or integrity," intend to ex-

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year of employment. The normal procedure for academic personnel is to establish oneself at a college or university, work for several years to build a reputation, both in the community and in one's academic field, and apply for a tenured position. It takes many years to accomplish this. It will be much more difficult for Jablon, as compared with Roth, to reestablish himself at a new college or university after working at one college for four years and being terminated for unspecified grounds.

tend the protection of the fourteenth amendment to an instance in which a termination results from a naked assertation of professional incompetence? Or, were the examples given (i.e., honesty or integrity) intended to be exclusive? Analysis indicates that *Roth* and similar cases dealing with job termination center on the question of a person's right to earn a living at his chosen profession.[3] It is this element of "liberty" which the fourteenth amendment protects.

The Court of Appeals has incorrectly interpreted *Roth* to mean that a hearing is only required when one's honesty and morality are questioned. Apparently, for the Court of Appeals, one's "standing and associations in the community" are only damaged by charges of this nature. Even though the Court of Appeals acknowledges that petitioner's future employment prospects may be foreclosed, under its interpretation of *Roth,* this fact is apparently irrelevant to the determination of damage to petitioner's standing and associations in his community. Since the manner of termination did not suggest that petitioner was guilty of dishonesty or immorality, only that he was *incompetent,* the damage done to him was beyond the scope of the *Roth* decision.

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[3]See e.g., *Zumwalt v. Trustees of the California State Colleges, et al.*, 109 Cal.Rptr. 344, 353 (1973), where the court stated: "'Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' (*Wisconsin v. Constantineau,* 400 U.S. 433, 437, quoted in *Board of Regents v. Roth,* supra.) In such a case due process demands an opportunity to refute adverse claims at a hearing whose only purpose (if job reinstatement is not possible) is to clear the individual's name."

This conclusion is contradicted, though, by the Court of Appeals' own implicit acknowledgment that *Roth* was not limited to instances in which honesty or morality were questioned. "Good name, reputation, honor or integrity," the interests described in *Roth*, are broader than the limited issue of honesty or morality.[4]

Clearly, a critical question bearing on a person's right to practice his profession is *competence*. Morality and honesty, while sometimes grounds for termination, are often ancillary to the central issue of competence, as traditional doctrines of slander, libel, and defamation confirm. See, *Stoneking v. Briggs*, 62 Cal. Rptr. 249, 254 Cal.App.2d 563 (1967).[5] Thus, when the State labels a person "incompetent" without evidentiary substantiation and testimony establishes that termination on this ground prevents him from pur-

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[4]Five weeks after deciding *Jablon* the Ninth Circuit determined that professional competency is within the *Roth* stigma concept. *Stewart v. Pearce, et al.*, No. 71-8775, September 17, 1973, Appendix D. The *Stewart* opinion filed by Judge Choy nearly a month after Petitioner's Motion for Rehearing (filed August 23, 1973) makes *Jablon* even more incomprehensible since the "stigma" in *Jablon* was uncontroverted.

[5]In *Stoneking v. Briggs*, Stoneking was the president of a union local. A union international official took charge of the union local and removed Stoneking and other union leaders from office, stating that the dismissal was for internal reasons and for failure to abide by union and federal laws. This statement was subsequently printed in a local newspaper. On the basis of this statement, Stoneking sued for defamation. The jury was left with the quetion of whether this statement, attacking the competency of Stoneking, constituted defamation. The Court of Appeals, in affirming the jury's finding of defamation, stated: ". . . [T]he sting of the accusation is that he [Stoneking] . . . was grossly incompetent to occupy the office of president. There can be no question that this '[t]ends directly to injure him in respect to his office, profession, trade or business, * * * by imputing to him general disqualification in those respects which the office or other occupations peculiarly requires * * *.' Civil Code § 46, subd. 3."

suing his profession, he has been materially deprived of liberty within the locus of the fourteenth amendment and the *Roth* exposition of that right. A substantive right has been encroached upon which would normally entitle petitioner to bring charges of defamation and seek redress in the form of damages. His "good name," and his "reputation" have been materially damaged by the charges made by the President of the College, even though no one has raised the innuendo that he had, for example, converted public funds or engaged in immoral conduct.

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3. COURT OF APPEALS' INTERPRETATION OF ROTH LEAVES PETITIONER WITHOUT ANY REDRESS TO CLEAR HIS NAME.

To deny petitioner's right to a hearing to expose the basis for the damaging charges (which is the rationale of *Roth)* is to deny him any redress whatsoever. His only other option would be a libel action against the College itself. This theory provides no remedy in California.

> "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious."
>
> *Lipman v. Brisbane Elementary School District,* 55 Cal.2d 224, 11 Cal.Rptr. 97, 99 (1961).

Similarly, the court stated:

> "The District is immune from tort liability for the alleged acts of the trustees within the scope of

their authority, and familiar principles of agency preclude liability for acts outside the scope of their authority."

Id. at 100.

Therefore, notwithstanding a statutory right to be free from defamation which runs to professional competency (California Civil Code § 46, subd. 3), California law, enunciated in *Lipman,* deprives petitioner of relief.

CONCLUSION

The Ninth Circuit Court of Appeals opinion imposes an interpretation on *Roth* which nullifies the impact of the *Roth* decision. In addition, the Court of Appeals, to reach this decision, found it necessary to conclude the opposite of uncontroverted material facts, reversing the District Court decision of Judge Weigel.

For these reasons, a writ of certiorari should issue to review the decision of the Ninth Circuit.

Dated, San Francisco, California,
November 26, 1973.

Respectfully submitted,
SHELDON L. GREENE,
JOHN P. KELLEY,
LORENZ, GREENE AND KELLEY,
Counsel for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

BARRY JABLON, *Plaintiff-Appellee,* vs. TRUSTEES OF THE CALIFORNIA STATE COLLEGES; GLENN S. DUMKE, Chancellor of the California State Colleges; S.I. HAYAKAWA, President of San Francisco State College, *Defendants-Appellants.*	No. 73-1485

[August 9, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES and CHOY, Circuit Judges, and MURRAY* District Judge.

CHOY, Circuit Judge:

Dr. Barry Jablon, an untenured assistant professor of English at San Francisco State College (the College), brought this suit charging that his employment was unlawfully terminated at the end of the 1970-1971 academic year. In the fall of 1969, Jablon was informed that the president of the College, Dr. S. I.

*The Honorable W. D. Murray, Sr. District Judge for the District of Montana, sitting by designation.

Hayakawa, had determined that 1970-1971 would be Jablon's terminal year. However, Hayakawa indicated that his decision was not final and that he was calling for a later reevaluation.

Hayakawa's decision not to rehire Jablon did not follow the formal written recommendations of the department's Hiring Retention and Tenure Committee (HRT), the department chairman, or the dean of the School of Humanities. And, despite a further recommendation of HRT that Jablon be rehired, Hayakawa decided in the spring of 1970 not to change his original decision.

Jablon then initiated proceedings under the Interim Grievance Procedures for Academic Personnel then in effect on the campus. The grievance procedures provide for a hearing before a committee composed of tenured faculty members and permit the aggrieved instructor to introduce evidence of his own and examine any witnesses against him. Although the recommendation of the committee is not binding upon the president, the grievance procedures provide:

> 6.3 The decision of the President, except in rare cases and for compelling reasons, shall concur with the judgment of the hearing committee. In the event that the President's decision is not in accord with the grievance committee's judgment, the compelling reasons for his decision shall be stated in writing to the aggrieved and to the hearing committee.

At the hearing, Jablon argued only that he was academically qualified and, therefore, he should be

retained. After deliberating, the committee voted 4-1 that the president should review the decision not to retain Jablon. Hayakawa requested a clarification of what the committee meant by the vote. The chairman, without consulting the other members indicated that he interpreted the four votes for review to mean votes for retention. But when the individual members of the committee were asked to interpret their votes, two members said Jablon should be retained; one member said he should not be retained; and two members declared that their votes had only been for an additional review of the case.

In view of this split, Hayakawa concluded that the committee had failed to reach a decision on the issue of Jablon's retention and that it was impossible for him to concur as required by Section 6.3 of the Grievance Procedures. He reviewed the decision again since it was clear that a majority of the committee wanted a review and determined that his original decision should stand.

Jablon was notified of the decision and registered an appeal with the Chancellor of the California State Colleges as is permitted under the grievance procedures. The chancellor, however, can only review those decisions when the president fails to concur with the hearing committee and the chancellor interpreted Hayakawa's decision as a concurrence with the hearing committee's decision requesting a review.

Thereafter, Jablon commenced this lawsuit. The basis of the lawsuit is substantially different from the issue raised in the grievance proceedings. Whereas

the grievance proceeding dealt only with Jablon's academic qualification, the gravamen of the lawsuit is that Jablon was not retained because of his political beliefs and union membership.[1] The district court, however, never reached this issue because it had not been raised at the college administrative proceeding.

But the court ordered the College to reinstate Jablon with back pay, ruling that the president had violated the College rules in not remanding the matter to the committee for further deliberation until the committee reached a definite decision on the retention issue. The court felt that if the committee were unable to break its deadlock, the President would have to request that a new committee be formed to hear the matter *de novo.*

As an alternate ground for ruling in favor of Jablon, the court held that the College had imposed a stigma upon Jablon, so he was entitled by procedural due process concepts to an evidentiary hearing on his termination, and that the grievance procedure hearing did not fulfill the constitutional requirement. We reverse.

We agree with the district court that we cannot consider Jablon's First Amendment claims. Formal presentation of a claim in the administrative proceeding is a prerequisite to a lawsuit. *Toney v. Reagan,*

[1]From 1968 through 1970, the college was in turmoil and the faculty and students were divided on many academic and political issues. There were both student and faculty strikes during the period. Jablon was an active and vocal member of the teachers' union which actively supported the strike. President Hayakawa was a vocal opponent of the strikes and allegedly very hostile to the leaders of the strike.

467 F.2d 953 (9th Cir. 1972); *Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969).

However, we disagree with the court's conclusion that rights guaranteed Jablon by Section 6.3 were violated. The court interpreted the college rules to require a majority recommendation on the issue of retention before the president could act. The rules do not require the committee's recommendation to be either for retention or nonretention. The rules only state that:

> Upon arriving at a decision by majority vote, the hearing committee shall forthwith transmit to the President or to the acting chief administrative officer of the college, and to the aggrieved, a written statement of the committee's findings and recommendations together with a complete record of the committee's proceedings . . . Rule 5.51

The Vice President of the College, Dr. Garrity, testified that recommendations to review without any specific recommendation with regard to retention had often been accepted in the past as valid recommendations.

Nothing in the rules provides that in the case of a split vote on the issue of retention, a remand or *de novo* hearing is required, or suggests that the president must require a split vote to be reconsidered, or that a deadlocked committee must be disbanded and a new committee appointed. While such procedures would be reasonable for the College to adopt, we have no authority to amend the grievance procedures accordingly. The issue before us is only whether the College complied with its existing rules.

The committee agreed that the president should review his original decision. The president did just that. A majority of the committee did not conclude that Jablon should be retained. The committee's decision was in effect that the president in his discretion should resolve the problem. He did.

Since the action of the president was consistent with the recommendation of the hearing committee. Jablon was properly denied his right to appeal to the chancellor.

We are dealing with a set of rules drafted and adopted by the College in conformity with guidelines issued by the Board of Trustees of the State College System. Both the College and the chancellor's office reviewed this matter and concluded that the proper procedures had been followed. When a local regulation is silent on a particular problem and the point has been considered by those who drafted the regulation and have dealt with it on a day-to-day basis since its adoption, considerable weight must be given to their interpretation. We think the College fairly and substantially complied with its own regulations.

We also disagree with the district court's alternate ground for its decision. The court found that the College's decision not to rehire Jablon, coupled with the president's charges against Jablon, imposed a stigma upon Jablon which damaged his standing in the community and his opportunities for future employment; therefore, he was entitled to a hearing on his nonretention by due process concepts, citing *Board of Regents v. Roth,* 408 U.S. 564 (1972).

We think the court below misapplied *Roth*. A hearing is only required when a charge is made that "might seriously damage his standing and associations in the community . . . for example, that he had been guilty of dishonesty or immorality. Had it [the State] done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and and an opportunity to be heard are essential.' . . ." *Roth, supra* at 573.

Thus, only a limited type of stigma that seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities requires a hearing. In the instant case, Jablon was not so disadvantaged. The College did not attack his honesty or integrity. The reasons raised at the grievance hearing all related to his academic performance at the College, which did not deem him to be a good enough overall teacher and scholar to merit retention. This is not the type of stigma that the Court was referring to in *Roth*. Moreover, the fact that this may have a deleterious effect upon Jablon's future employment prospects is unfortunate, but the Supreme Court specifically noted in *Roth, supra* at 574, n. 13 that this "kind of foreclosure of opportunities" does not give rise to a right to a hearing. Accordingly, due process concepts do not require that the college grant Jablon another hearing on the issue of his retention.

In light of our decision, we need not determine whether the district court was prohibited by the

Eleventh Amendment from ordering the State to pay Jablon back wages.

Reversed.

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 73-1485 Trustees of the Calif State Colleges etc, et al vs. Barry Jablon

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered Aug. 9, 1973 —REVERSED—the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews, Clerk
U.S. Court of Appeals

Appendix B

In the United States District Court
for the Northern District of California

No. C-71-2012 SAW

Harry Jablon,
Plaintiff,

vs.

Trustees of the California State Colleges, Glenn S. Dumke, Chancellor of the California State Colleges; S. I. Hayakawa, President of San Francisco State College,
Defendants.

[Filed Mar. 2, 1973]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This is a suit brought by Dr. Barry Jablon, an untenured Assistant Professor of English at San Francisco State College,[1] charging that his employment was unlawfully terminated at the end of the 1970-71 academic year.

The defendants are a group of individuals serving by appointment as the Trustees of the California State College System, who have over-all responsibility

[1]Now called California State University at San Francisco.

for determination of policies under and according to the Education Code of the State of California; Glenn S. Dumke, the Chancellor of the California State College System, who is charged with the duty and responsibility of effectuating such policies throughout the various colleges of the system, and S. I. Hyakawa, who at all times since December of 1968 has been President of San Francisco State College, one of the State Colleges of the State College System, charged with the duty of making certain decisions regarding employment in connection with hiring, retention, and tenure at San Francisco State College.

Dr. Jablon alleges that a decision made by President Hayakawa not to rehire him violated his First Amendment right to free speech and his Fourteenth Amendment right to procedural due process. Accordingly, this Court has jurisdiction under 28 U.S.C. §§ 1331(a), 1343(3), and 42 U.S.C. § 1983. The case was tried to the Court without a jury.

Summary of the Facts

From 1968 through 1970, San Francisco State College was in turmoil. Faculty members were sharply, often bitterly, divided on many academic and political issues. A student "strike" begun in November, 1968, was followed by a faculty strike called by the American Federation of Teachers, Local 1352, AFL-CIO in December, 1968.[2]

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[2]The union is now named the United Professors of California, AFL-CIO.

Dr. Jablon was an active and vocal member of Local 1352 supporting the strike. He had been hired as an Assistant Professor of English for the 1967-68 academic year. His contract had been renewed for the two successive years. However, in the fall of 1969, despite the unanimous recommendations for retention from the Hiring, Retention, and Tenure (HRT) Committee of the Department of English, from the Chairman of the English Department, and from the Dean of the School of Humanities, President Hayakawa notified Dr. Jablon that 1970-71 would be his "terminal year" of employment. At the same time, President Hayakawa informed the HRT Committee that he had received "substantial evidence" which raised serious doubts about Dr. Jablon's "professional responsibility and fitness," and requested the HRT Committee further to investigate Dr. Jablon. An investigation was conducted which resulted in the recommendation of the HRT Committee, the Chairman of the Department of English, and the Dean of the School of Humanities that President Hayakawa rescind the letter of termination and substitute a letter of retention. Despite requests by the HRT Committee, President Hayakawa never supplied the HRT Committee with any evidence which reflected negatively upon Dr. Jablon's professional responsibility or fitness. On June 18, 1970, President Hayakawa reaffirmed his earlier decision that 1970-71 would be Dr. Jablon's terminal year of employment.

In the fall of 1970, Dr. Jablon initiated grievance procedures, pursuant to the Interim Grievance Procedures for Academic Personnel,[3] challenging Presi-

dent Hayakawa's decision to retain him for a terminal year only. The Grievance Procedures provide for a hearing before a Hearing Committee composed of tenured faculty members, at which the aggrieved may introduce evidence of his own and examine any evidence or witnesses against him. Although the recommendation of the Hearing Committee is not binding upon the President, the Grievance Procedures provide:

> 6.3 The decision of the President, except in rare cases and for compelling reasons, shall concur with the judgment of the hearing committee. In the event that the President's decision is not in accord with the grievance committee's judgment, *the compelling reasons for his decision shall be stated in writing to the aggrieved* and to the hearing committee. (Emphasis added.)

The Hearing Committee met in April, 1971, and considered Dr. Jablon's appeal. Following the hearing, the five committee members were polled by the Hearing Committee Chairman, Dr. Ben Ard. Four members voted in favor of Dr. Jablon's appeal and recommended that President Hayakawa "review the decision not to retain Dr. Jablon." One member voted not to recommend a review. Dr. Ard communicated the recommendation to President Hayakawa by letter dated May 5, 1971. Shortly thereafter, Dr. Ard was advised by Dr. John Edwards, the Executive Vice

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[3]These Interim Procedures have since been superseded by substantially similar Grievance Procedures promulgated by Executive Order 112 of the Chancellor of the California State College System, acting pursuant to 5 Cal. Adm. Code §42174.

President, and Dr. Neil Christal, Chairman of the Grievance and Disciplinary Action Committee of the Academic Senate, that the Grievance Procedures require the Hearing Committee to recommend either that Dr. Jablon be "retained" or "not retained", *i.e.*, not merely recommend review. Without re-polling the Hearing Committee members, Dr. Ard interpreted the four votes for "review" to mean votes for retention and accordingly wrote President Hayakawa on May 25, 1971, that it was the recommendation of the Hearing Committee that Dr. Jablon be retained. When Dr. Edwards then asked the members of the Hearing Committee to sign Dr. Ard's letter, only one agreed with Dr. Ard that the Hearing Committee had voted to "retain." Two members indicated their votes had been for "review" only. The fifth member affirmed his earlier vote "not to review."

In view of the split vote by the Hearing Committee, President Hayakawa concluded that the Hearing Committee had failed to reach a decision and that therefore it was impossible for him to concur as required by Section 6.3 of the Grievance Procedures. On June 22, 1971, President Hayakawa wrote Dr. Jablon that the decision to terminate his employment at the end of the 1970-71 academic year remained unchanged. President Hayakawa never informed Dr. Jablon of the reasons for his termination.

Under the Grievance Procedures, appeal may be taken to the Chancellor of the California State Colleges only in those instances when the President fails to concur with the Grievance Hearing Committee's

recommendation. Even though President Hayakawa stated that "it was impossible to 'concur' " with the Hearing Committee, the Chancellor interpreted his decision as a concurrence and therefore denied Dr. Jablon's appeal.[4]

Concerning Compliance With College Grievance Procedures

In most circumstances, the Due Process Clause of the Fourteenth Amendment does not require a college to grant a hearing to a nontenured teacher whose employment contract is not renewed. *Board of Regents v. Roth,* 408 U.S. 564 (1972). But nothing in *Roth* prevents a college from itself setting higher standards of academic due process than those required by the Fourteenth Amendment. 408 U.S. at 578-79. Once such higher standards are established, they become an essential part of an instructor's employment contract and must be observed. College officials are not at liberty to render the higher standards meaningless by disregarding them. *See, Ferguson v. Thomas,* 430 F.2d 852, 856 (5th Cir. 1970); *Greene v. Howard University,* 412 F.2d 1128 (D. C. Cir. 1969).

San Francisco State College's Interim Grievance Procedures for Academic Personnel set commendably high standards of academic due process. One of the most significant is the requirement of Section 6.3, quoted *supra,* that the President concur with the

[4]Letter of July 11, 1971, from Yolanda Chambers, Principal Personnel Analyst, Faculty and Staff Affairs, Office of the Chancellor, to Dr. Barry Jablon.

Grievance Hearing Committee's recommendation, except in rare circumstances where the President sets forth in writing compelling reasons for not concurring. Section 6.3 does not deprive the President of his power to make final and binding decisions, but it does guard against the arbitrary and capricious exercise of that power.

Dr. Jablon's rights under the college's own regulations were violated by the failure to follow the requirements of Section 6.3. A recommendation by the Hearing Committee in which a majority concurs is a precondition to a Presidential decision.[5] Since no recommendation commanded a majority of votes, there was no Hearing Committee decision in which President Hayakawa could concur or not concur. Though the Grievance Procedures do not address the problem of a split vote, the salutary policy of preventing arbitrary and capricious presidential decision-making, which underlies Section 6.3, dictates that in such circumstances the President should remand to the Hearing Committee for further deliberation. If the Hearing Committee is unable to break its deadlock, then the President should request that a new Grievance Hearing Committee be formed pursuant to the Grievance Procedures which will hear the matter *de novo* and make a new recommendation to the President.

The absence of a majority recommendation also operated to deprive Dr. Jablon of his academic due

[5]Section 5.51 of the Interim Grievance Procedures states clearly that the Hearing Committee shall arrive at a decision "by majority vote. . . ."

process right to appeal to the Chancellor. Section 7.4 of the Grievance Procedures provides:

> 7.4 The aggrieved may appeal to the Chancellor after the President's decision has been reached if the President does not concur with the recommendations of the hearing committees.

In the face of a split vote by the Hearing Committee, the Chancellor came to the impermissible conclusion that President Hayakawa had actually concurred in a majority recommendation to "review" his decision. Dr. Jablon's appeal was thereby unlawfully forestalled. Moreover, the conclusion of the Chancellor is not supported by the record. By President Hayakawa's own admission, there was no majority decision in which to concur or not concur.[6] The integrity of the appeal procedure to the Chancellor can be preserved only by requiring a majority decision in which the President can concur or not concur.

Concerning Procedural Due Process

In *Board v. Roth, supra,* the Supreme Court recently considered the procedural due process rights of untenured college professors. In that case, the respondent had been hired for a fixed term of one year at a state university. In compliance with Rules

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[6] "In view of the splits in the 'decision' of the committee, you will understand that it is impossible to 'concur,' since there is nothing in which to concur." (Letter of June 22, 1971, from President Hayakawa to Dr. Jablon.) But even assuming, *arguendo,* that a majority did recommend "review," President Hayakawa testified at trial that he did *not* review Dr. Jablon's entire file nor the Grievance Hearing Committee tapes before informing Dr. Jablon that the decision not to reemploy him remained unchanged.

promulgated by the Board of Regents, the President of the university informed the respondent that he would not be rehired for the following academic year. The respondent never received reasons for the President's decision, nor was he afforded a hearing to challenge the decision. The Court held that the mere nonrenewal of the respondent's employment contract did not violate his procedural due process rights because he was not deprived of "liberty" or "property" protected by the Fourteenth Amendment.

Nevertheless, the Court took pains to declare:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 . . . [citations]. In such a case, due process would accord an opportunity to refute the charge before University officials [footnote omitted] . . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. 408 U.S. at 573.

In connection with his decision not to reemploy Dr. Jablon, President Hayakawa made serious, un-

substantiated charges against Dr. Jablon. He wrote the Chairman of the English Department and the Dean of the School of Humanities that "substantial evidence" had come to his attention which raised serious doubts about Dr. Jablon's "professional responsibility and fitness." Yet, at no time did President Hayakawa provide the Chairman or the Dean or the HRT Committee (whose responsibility it was to investigate the President's charges) with evidence to support his charges. Unless Dr. Jablon is given written reasons for President Hayakawa's decision and a hearing to refute the charges made by the President, Dr. Jablon's standing and associations in his community can be seriously damaged.

Furthermore, President Hayakawa's decision not to rehire Dr. Jablon, coupled with his unsubstantiated charges against Dr. Jablon, have imposed a stigma upon Dr. Jablon damaging his opportunities for employment at other academic institutions. This is not a case such as *Roth,* where the record is devoid of evidence supporting the existence of a stigma.[7] On the contrary, the undisputed testimony of Dr. Edwin Nierenberg, Dr. Eric Solomon, and Dr. Dolora Cunningham, establishes that under the circumstances in which Dr. Jablon was not rehired, college hiring committees will not seriously consider Dr. Jablon's

[7]At 408 U.S. 574 n.13, the Court points out that the District Court and Court of Appeals made the *assumption* that the failure to rehire Roth would have a substantial adverse effect on his subsequent academic career. The Court held that "the record contains no support for these assumptions."

application for employment.[8] Dr. Jablon's rights have been violated sufficiently to require that he be afforded the Fourteenth Amendment procedural due process protections of (1) a written statement of any reasons for President Hayakawa's decision not to rehire him and (2) a hearing.

The procedural due process requirement of a hearing does not prescribe a static *form* of hearing. "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Bodie v. Connecticut,* 401 U.S. 371, 379 (1971). In Dr. Jablon's case, the grievance hearing procedures promulgated by Executive Order 112 of the Chancellor of the California State College System, acting pursuant to 5 Cal. Adm. Code § 42174, fulfill the constitutional requirement of procedural due process. The Ninth Circuit carefully considered these grievance procedures recently and found them to be "fair and adequate." *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972).[9]

Concerning First Amendment Rights

Dr. Jablon's claim that he was refused retention at San Francisco State College solely to penalize

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[8]These professors have had substantial experience on hiring committees at San Francisco State and at other institutions of higher learning.

[9]In *Toney*, the Court was concerned with exhaustion of state remedies. The Court concluded "that the state remedy was fair and adequate as to these appellants and that under *Whitner v. Davis*, [410 F.2d 24 (9th Cir. 1969)], they were required to exhaust it." Toney v. Reagan, 467 F.2d 953, 957 (9th Cir. 1972).

his exercise of protected First Amendment rights states a cause of action cognizable under the civil rights statutes. *Perry v. Sinderman,* 408 U.S. 593 (1972).[10] However, formal presentation of such claims to the college Grievance Hearing Committee is prerequisite to suit here. *Toney v. Reagan, supra. See also, Whitner v. Davis,* 410 F.2d 24 (9th Cir. 1969). *Toney* involved professors of the California State College System who filed a civil rights action pursuant to 42 U.S.C. § 1983 alleging that their employment contracts were not renewed because they had exercised their First Amendment rights. The Court of Appeals held that the college grievance procedures must be exhausted before relief may be sought in the federal courts. The Court of Appeals acknowledged that if the state administrative remedy were designed to provide only a means of obtaining relief from a deprivation of civil rights which had *already* occurred, the plaintiffs would not have been required to exhaust it before instituting a federal civil rights suit. *See McNeese v. Board of Education,* 373 U.S. 668 (1963). However, since the college grievance procedures provided the plaintiffs an opportunity to forestall a *threatened* discharge, they had to be exhausted. While Dr. Jablon did initiate and pursue a grievance in accordance with the college grievance procedures, the evidence is uncontroverted that he failed there

[10]In *Perry,* the Supreme Court reaffirmed its prior holdings in Shelton v. Tucker, 364 U.S. 479 (1960) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) that "the nonrenewal of a nontenured teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." 408 U.S. at 598.

to raise any First Amendment claims. Unless and until so raised and denied, suit here on that ground is premature.

The foregoing constitutes the Findings of Fact and Conclusions of Law in this case.

JUDGMENT

For the foregoing reasons, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, are hereby enjoined from failing to:

A. Provide the plaintiff with a grievance hearing in accordance with the Grievance Procedures promulgated by Executive Order 112 of the Chancellor of the California State College System, acting pursuant to 5 Cal. Adm. Code § 42174, and in accordance with the decision of this Court that a majority of the members of the Grievance Hearing Committee must concur in any recommendation made by the Committee to the President of the college;

B. Provide the plaintiff, at least 30 days prior to the grievance hearing, with a written statement of reasons upon which the defendants relied in deciding not to rehire the plaintiff for the 1971-72 academic year at San Francisco State College;

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 71-1875

LAWRENCE STEWART, *Plaintiff-Appellee,*

vs.

FRANK C. PEARCE, ROBERT L. EWIGLEBEN, ROBERT A. TARVER, ELIO A. FONTANA, ELEANORE D. NETTLE, FRANCIS W. PEARSON, JR., CARL E. WARD, CLIFFORD G. ERICKSON and MATTEO V. FASNARO, *Defendants-Appellants.*

[September 17, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: TRASK and CHOY, Circuit Judges, and TAYLOR,* District Judge.

CHOY, Circuit Judge:

This is an appeal from a district court order granting Stewart a preliminary injunction. The injunction

*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

mandates appellants Pearce and other officers and Governing Board members of San Mateo College (the College) to reinstate Stewart as an instructor in English because his procedural due process rights under the Fourteenth Amendment were violated. We affirm.

Since June of 1968, Stewart has been employed by the College as an instructor in English, and was under contract[1] with the College for the 1970-71 academic year.

During the 1969-70 school year Stewart participated in several campus anti-war protest activities which were critical of the Vietnam war, and in one instance particularly disparaging of the College administration.[2] On July 28, 1970 pursuant to a state statute,[3]

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[1]Stewart's employment contract is similar to the one described in *Board of Regents v. Roth*, 408 U.S. 564 (1972) at 566 n.1. His formal notice of appointment contained only scant information as to starting date, salary, assignment to the English division and teaching assignment for fifteen units in both fall and spring. There is no further written evidence of a contract, but the trial court's findings clearly refer to the existence of one.

[2]The activities included distributing peace literature, carrying signs, and asking students to boycott classes on November 15, 1969, the Vietnam war moratorium day. Also, on May 6, 1970, immediately after the Kent State shootings, Stewart was one of many speakers before a gathering of students in the student union cafeteria. There, in an emotional speech he sharply criticized both the war and the College president. Finally, on May 11, Stewart participated in a "guerilla theater" vignette in which he portrayed a symbolic authority figure who ends his performance by burning a copy of Roberts' Rules of Order.

[3]California Education Code §13411 provided:

> No employee shall be suspended on a charge of incompetency due to mental disability until the governing board has appointed an independent recognized psychiatrist to examine him, nor unless the psychiatrist reports in writing to the governing board that the employee is, in his opinion, suffering from mental disability of such character as to

Pearce, Dean of Instruction, by letter ordered Stewart to undergo a psychiatric examination to determine his mental competency to perform his duties. Stewart, on vacation at the time, failed to receive that letter, but did receive a similar letter from Ewigleben, the president of the College, dated August 5, 1970. On advice of counsel, and claiming the College administrators' order was in bad faith, Stewart refused to submit to the psychiatric examination. No reason for ordering the examination was given by appellants until September 17, 1970, when it was admitted that the 1969-70 activities were the cause.

Upon Stewart's refusing to submit to the psychiatric examination, Pearce on September 2, ordered him removed from his classroom teaching duties and reassigned to assisting the librarian without reduction in compensation. Stewart exhausted the College grievance procedures, which resulted in the Governing Council of the Faculty Senate recommending that Stewart be returned to his teaching duties. The College, however, did not heed this recommendation and

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render him incompetent to perform his duties. The employee against whom the charge is filed shall submit to the examination, but shall be entitled to be represented thereat by a psychiatrist or physician of his own choice, and the report of the psychiatrist or physician selected by him shall be filed with the governing board at the request of the employee. The employee shall, upon request, and before action by the board, be furnished with a complete copy of all reports made by the psychiatrist appointed by the governing board.

The section has since been amended to provide for a written statement of facts and an opportunity to appear within ten days to explain or refute the charges. See California Education Code §13411(b) (West Supp. 1973).

told Stewart that his library assignment was to continue. Having worked in the library for six weeks in the hope of being returned to teaching, Stewart stopped reporting to the library. On November 25, the College initiated action to dismiss him pursuant to California Education Code §§13403-08 for refusal to perform regular assignments without reasonable cause. The mental incompetence proceedings were then dropped.

Stewart thereupon filed this action in the district court for a declaratory judgment, temporary restraining order, and damages under the Civil Rights Act, 42 U.S.C. §1983 and 28 U.S.C. §1343. In granting the preliminary injunction requiring Stewart's immediate reinstatement to his teaching duties, the district court held requisite the minimal due process safeguards of a statement of reasons, notice of a hearing, and a hearing in this situation where *both* the unexplained psychiatric examination order and removal from the classroom were involved.

Appellants make two contentions challenging the district court's order. First, they contend that Stewart had adequate remedies at law available in the state courts which should have been pursued before a federal action was brought. This argument is foreclosed by *Monroe v. Pape,* 365 U.S. 167 (1960) where the Court held that failure to exhaust state court remedies does not defeat a claim under the Civil Rights Act since "[t]he federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked." *Id.* at

183. See also *Whitner v. Davis,* 410 F.2d 24, 28 (9th Cir. 1969).

Appellant's second contention is that no due process rights attach when an employee is assigned to other duties—in this case, to work in the library; that the transfer of assignment does not involve the deprivation of any interest protected by the due process clause. However, this overlooks the unexplained psychiatric examination order. Since the removal and transfer from the classroom were the consequence of the refusal to submit to that order, the validity of the order must be determined.

We hold the order was constitutionally invalid absent the prior giving to Stewart of reasons, notice of a hearing, and a proper hearing.[4] A hearing is required when any charge is made that "might seriously damage [a person's] standing and associations in his community . . . . For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972) *citing Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

The order by the College to report for a psychiatric examination implied that there existed both reasonable grounds for the order and mental unfitness for

[4]Stewart's working in the library after being ordered to report there pending the grievance proceedings did not constitute a waiver of his right to a proper hearing. Waiver of constitutional rights is not lightly inferred and every reasonable presumption against such waiver is indulged. *Fuentes v. Shevin,* 407 U.S. 67, 94-95 (1972).

the job. Moreover, the order created a "stigma, an official branding" of Stewart. *Wisconsin v. Constantineau, supra* at 437. "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Id. Cf. Jablon v. Trustees of the California State Colleges,* ..... F.2d ..... (9th Cir., August 9, 1973).

Stewart raises several additional arguments for affirmance based on the alleged deprivation of other constitutional rights. Since we hold that his right to due process has been violated, we need not reach these further issues.

Affirmed.